

**Editor's note: Reconsideration denied by order dated Aug. 4, 1980; Appealed -- aff'd, Civ.No. A80-226 (D.Alaska June 14, 1985); aff'd, No. 85-4020 (9th Cir. July 1985); aff'd (Sept. 28, 1987), 828 F.2d 1405; rehearing denied (Oct. 5, 1989), 886 F.2d 1405.**

RICHARD L. NEVITT

IBLA 80-71

Decided May 13, 1980

Appeal from decision of the Alaska State Office, Bureau of Land Management, dated June 8, 1979, rejecting homestead entryman's final proof, with permission to amend his entry to a 5-acre homesite application. F-19508 (Anch.)

Affirmed.

1. Homesteads (Ordinary): Generally

An entryman's final proof is properly rejected when it is defective on its face, with the final proof showing that the applicable residence and cultivation requirements have not been met.

APPEARANCES: Richard Lee Nevitt, pro se.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Richard L. Nevitt appeals from a decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting his homestead entry final proof, with permission to amend his entry to a 5-acre homesite application, providing that supplemental information is sufficient to validate residency requirements for a homesite application.

[1] Nevitt, who filed his final proof for homestead F-19508 (Anch.), sec. 33, T. 17 N., R. 38 W., Seward meridian, Alaska, seeks to obtain title for the entire 160 acres described in that final proof. The decision below held that Nevitt had failed to meet the mandatory cultivation and residence requirements set forth in the homestead law and in the Departmental regulations under the law which require that, at the time of the filing of final proof,

there must be shown also cultivation of one-sixteenth of the area of the claim during the second year of the entry and of one-eighth during the third year and until the submission of proof, unless the requirements in this respect

be reduced upon application duly filed. Cultivation, which must consist of breaking of the soil, planting or seeding, and tillage for a crop other than native grasses, must include such acts and be done in such manner as to be reasonably calculated to produce profitable results.

43 CFR 2567(b). Applying this regulation to the 160 acres which Nevitt seeks to claim, the decision below outlined the amounts of cultivation required each year and contrasted these amounts with the acreage which Nevitt and his various witnesses claimed were, in fact, cultivated. That table reads as follows:

<u>Entry Year</u>	<u>Acres Required</u>	<u>Entryman Claimed</u>	<u>First Witness</u>	<u>Second Witness</u>
1st 7/2/73 - 7/1/74	None	None	None	None
2nd 7/2/74 - 7/1/75	10 acres	None	None	None
3rd 7/2/75 - 7/1/76	20 acres	2-3 acres	None	None
4th 7/2/76 - 7/1/77	20 acres	2-3 acres of 3 goats, no cultivation	grazing	1+acre
5th 7/2/77 - 7/1/78	20 acres	None	None	None

Departmental regulations 43 CFR 2567.5(a)(1), (2) provides:

(1) Establishment. Residence must be established upon the claim within 6 months after the date of the entry or the recording of the location notice, as the case may be; but an extension of not more than 6 months may be allowed upon application duly filed, in which the entryman shows by his own statement, and that of two witnesses, that residence could not be established within the first 6 months, for climatic reasons, or on account of sickness, or other unavoidable cause.

(2) Length. A homestead entryman must show residence upon his claim for at least 3 years; however, he is entitled to absent himself during each year for not more than two periods making aggregate of 5 months, giving written notice to the proper office of the time of leaving the homestead and returning thereto.

Nevitt requested and was given an extension of 6 months until July 21, 1974, to establish residence. The residency requirements and residency claimed in final proof are as follows:

<u>Required Entry Year</u>	<u>Entryman Residence</u>	<u>First Claimed</u>	<u>Second Witness</u>	<u>Witness</u>
1st 7/2/73 - 7/1/74	6 month extension granted to July 2, 1974,	1-1/2 months	1 month edge	no knowl- edge
2nd 7/2/74 - 7/1/75	must show	12 months edge	no knowl- edge	no knowl- edge
3rd 7/2/75 - 7/1/76	residence for at	12 months edge	no knowl- edge	1 month
4th 7/2/76 -	least 3 years	5-1/2 months edge	no knowl- edge	12 months
5th 7/2/77 -	(see above)	None minable	undeter-	11 months

That these figures truly represent the acres required to be cultivated, the acres claimed, the residency required to be established, and the residency claimed, stands undisputed on the face of the record, and the argument which Nevitt raises on appeal is that the decision below failed to apply regulations that were reasonable, appropriate, and not inconsistent with the Homestead Act in Alaska. 43 CFR 2567.0-3.

In his statement of reasons for appeal, Nevitt requests a hearing and asserts the following:

1. The purpose of the Homestead Act is to impart land to the public for settlement and agricultural purposes.
2. It is the duty of the Department of the Interior, under the Secretary of the Department of Interior, and his subordinates, through powers given to him by the United States Code and Statutes, to make regulations that are appropriate, reasonable and not inconsistent with the purposes of the Homestead Act, and to provide changes, exemptions, special circumstances, and/or new regulations as may be necessary to fulfill the intent of the Homestead Act/Acts.
3. The entryman, by his actions has demonstrated good faith, towards fulfilling the purposes of the Homestead Act/Acts.

4. The entryman has fulfilled these purposes in good faith to an extent similar or exceeding that, of other already claims.

5. The entryman is entitled to equal protection under the law.

6. The regulations governing the Homestead Acts and this claim in particular, are not consistent with the regulations governing prior homesteads in other locations within Alaska, when compared against the original purposes of the Homestead Act, and against the surrounding circumstances of settlement and agricultural use of claims in different locations.

7. The Department of the Interior has not consistently enforced the settlement, agricultural, or nonspeculative purposes of the Homestead Act.

8. There are special circumstances surrounding my claim, in regard to location, residency, and cultivation which warrant at least special attention.

For these reasons I am appealing the decision regarding my entry and requesting a hearing and assignment of this case before an Administrative Law Judge for such a hearing.

Under a homestead entry, a homesteader must establish his residence within 6 months; however, he can secure an extension up to 6 months in time. He must then clear and cultivate one-sixteenth of the land area of his entry by the end of the third year, and thereafter, he must continue to keep the one-eighth under cultivation until he submits his final proof.

Here the appellant, in his final proof, has indicated clearance and cultivation for only 2-3 acres during the third year and fourth year of his entry. Appellant's final proof also states that improvements placed on the homestead land included two cabins, a bathhouse, and land clearing.

The homestead entry in this case is 160 acres in size. This would require that appellant clear and cultivate 10 acres on or before July 1, 1975. He had until July 1, 1976, to clear and cultivate 20 acres. The evidence of record clearly shows that this was not accomplished. There is no question from the record that Nevitt failed to comply with the provisions of the Homestead Act with regard to the maintenance of residence and the clearing and cultivating of the land to the extent required.

We have long held that where a homestead entryman submits the testimony of two witnesses with his final proof and that testimony does not show that the entryman has complied with the cultivation and residence requirements of the law, the final proof is defective on its face. Final proof which is defective on its face will be rejected and the homestead entry canceled. Estate of Lon Philpott, Deceased, 28 IBLA 68 (1976).

Nevitt's own final proof submission, which stands uncontradicted on appeal, shows he failed to comply with the minimum requirements concerning residence and the cultivating of the land. There being no material issues of fact, Nevitt's request for a hearing is denied. See Flonie Thomas, 18 IBLA 7 (1974); Lois A. Mayer, 7 IBLA 127 (1972).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed and appellant shall be allowed 30 days from the receipt of this decision to amend homestead entry F-19508 to apply for a homesite claim of the 5 acres surrounding his improvements, which application, if filed, will be the subject of a further adjudication.

Edward W. Stuebing  
Administrative Judge

We concur:

Anne Poindexter Lewis  
Administrative Judge

Frederick Fishman  
Administrative Judge

